No. 14758

United States Court of Appeals
For the Ninth Circuit

RICHARD T. HAWLEY, *Appellant,*

vs.

ALASKA STEAMSHIP COMPANY, a corporation, *Appellee.*

UPON APPEAL FROM THE DISTRICT COURT FOR THE WESTERN DISTRICT OF WASHINGTON, NORTHERN DIVISION

BRIEF OF APPELLEE

BOGLE, BOGLE & GATES,
ROBERT V. HOLLAND,
Attorneys for Appellee.

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ADDITIONAL STATEMENT OF THE CASE

The appellant was directed to go to the No. 1 hold of the vessel (R. 109) after being advised by his immediate superior, the first assistant engineer, that it would be alright to take extra work which was available to him under the contract of employment (R. 142, 143, 144). The appellant's statement of the case refers to three inexperienced cannery workers but this description of the three cannery workers appeared only in the testimony of the appellant who later admitted on cross-examination that he did not consider himself an experienced stevedore (R. 163), that he would not be able to tell whether anyone else would be capable (R. 164) and that in any event their actions only "might have been some help to sustaining the injury I got" (R. 151).

As to the direction of the swinging of the load at the time of the injury, the plaintiff's witness Myers did not know whether the men were pushing or pulling (R.

174) and the plaintiff's witness Perry who was supervising the operation testified both that the boards would be swung "that way or the other way" (R. 189) and that this load was handled no differently than previous loads (R. 197).

As to the presence of any officer of the vessel the plaintiff was not at any time asked as to whether he had received supervision from any officer and in fact testified that there was a mate in charge of all the holds (R. 100).

ARGUMENT

I.

The Appellant Failed to Establish a Prima Facie Case.

A. In answer to appellant's argument on the failure of the vessel to provide a safe place to work there should first be eliminated from consideration the oft-repeated phrase of the appellant's brief referring to the "sheer drop" in the hatch. The plaintiff testified that he was working in the forward end of the hold (R. 96) and this is shown on plaintiff's exhibit No. 1 (R. 116) and by the diagram of the plaintiff's witness Myers (plaintiff's exhibit No. 5) (R. 178). On the contrary the "sheer drop" referred to by the appellant's witness Perry was at the after end of the hatch on the other side of the pallet board from the appellant (R. 188). There was no specific allegation of this condition in the pretrial order (R. 9) and the trial court recognized immediately that this condition was not involved in the case (R. 224).

The fact that the boards came down into the hold in a swinging manner was quite a common occurrence ac-

cording to the testimony of the plaintiff's witness Myers (R. 180). There was no other evidence that the fact that the loads were swinging constituted negligence in any respect.

Appellant states that had the area of work space been greater he would not have been forced to work so close to the board and could have avoided it as it swung toward him. He testified, however, that he had for the past hour and a half walked over to the pallet board after it had been lowered, had grabbed the forward inboard corner and swung the board to get it into position (R. 96). The load had already entered the hold, was down within two or three feet of the deck and was in a swinging motion when he reached out and "grabbed ahold of the corner of the bridle that I was supposed to get" (R. 145). At this time there was no indication that the space in which he was required to work was insufficient. This load was being landed in the usual manner (R. 194). The several men working there were to swing the load to get it into position and the appellant clearly had his hand on the same when this occurred (R. 146).

This was a hanging load of from 1600 to 1700 pounds (R. 146) and the load had only completed a quarter turn when appellant was hit (R. 150). He testified that the corner of the board moved only 10 inches before it hit him (R. 156) and that he knew that it was swinging in his direction (R. 146). With such a heavy load starting from a dead stop and commencing to swing (R. 158) it is inconceivable that the appellant either was unware of the motion of the load in his direction or that he was hit with any great force by the load.

B. Alleged Inexperience of Co-employees.

In the entire transcript there is only one reference to the co-employees being inexperienced and that is contained in the appellant's testimony (R. 95) in which he speaks of "two young fellows and an old fellow who were inexperienced." On cross-examination, however, he admitted that he did not consider himself an experienced cargo handler (R. 163) and that he could not say that he was able to state whether someone else was capable or not (R. 164). As to the other men in the hold who were members of the vessel's engine room department, it appeared from the testimony of the plaintiff's witness that it is customary in the Alaska run to have such extra work and that the same is provided to at least the firemen by their union contract (R. 142). Even if it be admitted that the fellow workmen *were inexperienced* there is no clear showing of proximate cause between their inexperience and the injury. The appellant on this phase was very speculative in stating as follows: "I would say their inexperience. That *might* have been some help to sustaining the injury I got" (Emphasis ours) (R. 151).

While appellant argues that the pallet boards had been swinging in a particular direction all morning, plaintiff's witness Myers stated that at the time of the accident he did not know whether they were pushing or pulling (R. 174) and the plaintiff's witness Perry stated that he did not know which way the board was being swung and that in any event it would be immaterial since either corner could hit the appellant just as well (R. 199). The appellant's witness Perry also testified that this board was being handled no more rough-

ly than were the other boards being handled that morning (R. 198).

C. A Mate of the Vessel Was Present on Watch and a Supervisory Employee Was Working in the Hold.

The only testimony whatsoever concerning the absence or presence of any officer of the vessel with reference to this work is contained in the testimony of the appellant in which he states that there was a mate in charge of all holds and that he traveled up and down from one hold to another at periods of times (R. 100). In addition the appellant substantiated a custom that one man out of the gang of five stevedores would be picked out to run the gang (R. 100). In the absence of any other testimony whatsoever there is no showing that the lack of supervision was such as to be the proximate cause of the alleged injury.

II.

The Trial Court Was Required to Follow the Scintilla of Evidence Rule as Applied in This Circuit.

The appellant cites cases setting forth the rule that the trial court cannot substitute its judgment for that of the jury in considering the testimony and the credibility of the witnesses. With this there can be no disagreement but the appellant overlooks the scintilla of evidence rule as applied by this court. In *Deere v. Southern Pacific Co.,* 123 F.(2d) 438, cert. denied 315 U.S. 819, 62 S.Ct. 916, 86 L.ed. 1217 (1941) Judge Garrecht was considering the propriety of the trial court's directed verdict for the defendant. The rules applicable to the grounds for giving a directed verdict would apply with equal force to granting of an involuntary dismissal. Judge Garrecht stated:

" 'The test as to whether a directed verdict should be granted, is not whether the evidence brings conviction in the mind of the trial judge; it is whether or not the evidence to support a directed verdict as requested, was so conclusive that the trial court in the exercise of a sound judicial discretion should not sustain a verdict for the opposing party.' O'Brien, Manual of Federal Appellate Procedure, 3d Ed., p. 15. Respecting the power of the trial court to grant or deny a motion for directed verdict the Supreme Court of the United States stated in *Gunning v. Cooley,* 281 U.S. 90, 91, 50 S.Ct. 231, 233, 74 L.ed. 720, as follows:

" ' "When on the trial of the issues of fact in an action at law before a Federal court and a jury, the evidence, with all the inferences that justifiably could be drawn from it, does not constitute a sufficient basis for a verdict for the plaintiff or the defendant, as the case may be, so that such a verdict, if returned, would have to be set aside, the court may and should direct a verdict for the other party." *Slocum v. New York Life Insurance Co.,* 228 U.S. 364, 369, 33 S.Ct. 523, 525, 57 L.ed. 879 (Ann. Cas. 1914D, 1029).

" 'A mere scintilla of evidence is not enough to require the submission of an issue to the jury. * * * ' "

Thus this Court followed the rule as set forth by the United States Supreme Court.

The foregoing quotation was repeated with approval in a seaman's case in *DeZon v. American President Lines* (C.C.A. 9th, 1942) 129 F.(2d) 404, aff'd 318 U.S. 660, 63 S.Ct. 814, 87 L.ed. 1065. In addition Judge Garrecht stated as follows:

"We are reminded by plaintiff that this act 'is to be liberally construed in aid of its beneficent purpose to give protection to the seaman and to those dependent on his earnings' (*Cortes v. Baltimore Insular Line, supra,* 287 U.S. 367, 375, 53 S.Ct. 173, 176, 77 L.ed. 368), but we must also be mindful of the fact that although the Jones Act has given 'a cause of action to the seaman who has suffered personal injury through the negligence of his employer' (287 U.S. 372, 53 S.Ct. 174, 77 L.ed. 368), still it does not make that negligence which was not negligence before, does not make the employer responsible for acts or things which do not constitute a breach of duty. 'A seaman is not entitled to compensation or indemnity in the way of consequential damages for disabilities or effects occasioned by the sickness or injury, *except in case of negligence.*' 24 R.C.L. Sec. 218, p. 1164." (Emphasis ours)

That the trial judge in the case at bar acted properly under the state of the evidence in determining that there was "not a scintilla of evidence" to support the claim of negligence is shown in a factually similar case decided by this court in 1947, *Seville v. United States* (C.C.A. 9th) 163 F.(2d) 296. In that case the injured seaman was struck by a swinging slingboard which pushed him backward causing him to fall. The court found that the appellant did not move fast enough to escape the swing and as a result sustained his injuries. In the case at bar the plaintiff's witness Myers testified that it was quite a common occurrence for loads to swing (R. 180).

While appellant contends that the interpretation of negligence as regards seamen must be liberally construed, it still appears from innumerable cases that the

courts, in defining this rule, do so with logic and reason. In *Roberts v. United Fisheries Vessels Company* (C.C.A. 1st 1944) 141 F.(2d) 288, cert. denied 323 U.S. 753, 65 S.Ct. 81, 89 L.ed. 603, the court said:

> "But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties, and, in the case of a seaman, he takes the same risks of his calling as he did before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault."

The rule in the *Roberts* case, *supra,* was followed with approval by the Second Circuit in *Lake v. Standard Fruit & Steamship Company* (1950) 185 F.(2d) 354, 356, as follows:

> "Under these circumstances we think the case is within the rule of *Roberts v. United Fisheries Vessels Co.,* 1 Cir., 141 F.(2d) 288, 293, certiorari denied 323 U.S. 753, 65 S.Ct. 81, 89 L.ed. 603, where the court, acknowledging that the defense of 'assumption of risk' was no longer available to the employer under the Jones Act, went on to say: 'But where the injury or death is not the result, in whole or in part of the negligence of the employer, or his agents, the provision has no effect to change the rights or remedies of the parties, and, in the case of a seaman, he takes the same risks of his calling as he did before under admiralty law. By the Jones Act he is given a right of action for the negligence of his employer which he did not have before, but the usual risks of the calling are not shifted on to the employer if the employer is guiltless of any fault.'
>
> "We recognize that juries are given and should

be given a wide scope in determining all questions of fact. But when it appears, as here, that involved are only 'the obvious and well-known risks of the business' then there is an absence of negligence in law and the case will not be left to the jury. *DeZon v. American President Lines, supra.*"

That this rule is not merely a guide to the trial court but is a *directive* is shown by the decision of this court in *United States v. Holland* (C.C.A. 9th, 1940) 111 F. (2d) 949, 953:

> "A federal court is not permitted to submit a case to a jury on probabilities or a mere scintilla of evidence, but there must be some substantial evidence offered by the plaintiff to justify submission of the case to the jury."

III.

The Doctrine of Comparative Negligence

The appellee can have no argument concerning the appellant's contention that the doctrine of comparative negligence is to be applied in this case. The appellant overlooks the possibility, however, that the trial court did apply the doctrine and found that the negligence of the appellee was nil and that the negligence of the appellant was one hundred per cent.

We think the following uncontradicted facts could well have led to this conclusion in the mind of the trial court: The appellant was standing three feet from the edge of the ladder which would have been to his left side (R. 104); he had about three feet available to him at his back where the salmon was stowed (R. 156); the load although it had been swinging as it came into the hatch, was steadied before it was swung anti-clockwise

(R. 158); the appellant knew from the fact that his hands were on the load that it was coming toward him (R. 146); and that the load moved only ten inches before it struck him (R. 156). All of these facts could well have indicated to the trial court that the appellant could have moved to his left a distance of at least three feet to miss the swinging load or that he could have stepped backward a distance of at least two feet nine inches to avoid the load. His failure to do so clearly indicated comparative negligence in the extreme, namely one hundred per cent negligence on the part of the appellant.

IV.
General Duty of a Vessel Owner

It has been often stated that the vessel owner is not required to provide an accident-proof ship. This court in January of 1955 agreed with this view in *Freitas v. Pacific Atlantic Steamship Company,* 218 F.(2d) 562, 564, as follows:

> "The law does not impose upon the shipowner the burden of an insurer nor is the owner under a duty to provide an accident-proof ship. *Lake v. Standard Fruit & Steamship Co.,* 2 Cir., 185 F. (2d) 354; *Cookingham v. United States,* 3 Cir., 184 F.(2d) 213. In the condition of the record there was nothing other than speculation on which to base a verdict for the plaintiff. Had the cause been submitted to the jury and a verdict against the shipowner returned, the court, in our opinion, would have been obliged to set it aside."

The most favorable testimony for the plaintiff on the swinging of the pallet was his own comment that "the fellows made a mistake and swing it counter-

clockwise'' (R. 95). This is far from showing by expert opinion or otherwise that proper supervision was lacking, that the co-employees were negligent, or that the place where the appellant was working was unsafe.

Also, the plaintiff in a Jones Act case is under a duty to present evidence not only of negligence, but of proximate cause between the alleged negligence and the injury. This needs no citation of authority but is found in principles of common law. On the swinging of the pallet board there is no evidence relating to proximate cause except that of the plaintiff's witness Perry who testified that he could not recall which way the board was being swung but that in any event he ''don't see where that is material because either corner could hit him just as well, whether it went one way or the other'' (R. 199). This sole bit of evidence on the swinging of the board disposes of any claim that the direction of the swinging was the proximate cause of the injury.

The appellant's claim that the work place was unsafe is hardly supported by his own testimony that he had three feet within which to move and that the board moved only a matter of ten inches before striking him (R. 156). Thus again, the three-foot area, if it be held to be too small, cannot be said to have been the proximate cause of the alleged injury.

Other than the plaintiff's own statement that the co-employees were inexperienced (R. 95), there is no evidence that said inexperience if it be admittd, contributed to the injury. Likewise, there is no testimony expert or otherwise tending to show that there was in fact any lack of supervision or if there was such lack, that it proximately caused the injury.

CONCLUSION

The trial court not only was permitted but was required by the plaintiff's evidence in the cause and by the rules laid down by this court, to grant the defendant's motion for dismissal at the close of the plaintiff's case. Wherefore, the appellant urges that the action of the trial court be affirmed.

Respectfully submitted,

Bogle, Bogle & Gates,
Robert V. Holland,
Attorneys for Appellee.